Filed 8/19/15 Brasch v. K. Hovnanian Enterprises CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| KENDALL BRASCH,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>K. HOVNANIAN ENTERPRISES, INC., et al.,<br><br>Defendants and Respondents. | G050131<br><br>(Super. Ct. No. 30-2013-00649417)<br><br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed.

Kabateck Brown Kellner, Brian S. Kabateck, Richard L. Kellner, Joshua H. Haffner, Tsolik R. Kazandjian; Bridgford, Gleason & Artinian, Richard K. Bridgford, Michael H. Artinian; McNicholas & McNicholas and John Patrick McNicholas for Plaintiff and Appellant.

Downey Brand, William R. Warne, Meghan M. Baker, Irina Kachagin and Avalon C. Johnson for Defendants and Respondents.

* * *

This is an appeal from an order granting the motion of K. Hovnanian Enterprises, Inc. and K. Hovnanian Companies of California, Inc. (collectively Hovnanian), to strike and sustaining the demurrer to class action allegations from the second amended complaint (the complaint) filed by plaintiff Kendall Brasch.[1] Plaintiff argues the complaint was legally sufficient to pass muster at the pleading stage, and the factual issues of whether they can establish a class should be addressed in an evidentiary motion to certify the class. Defendants argue the allegations are facially insufficient.

We agree with plaintiff the complaint is facially sufficient and conclude he should be given the opportunity to bring an evidentiary motion for class certification. We therefore reverse.

## I

## FACTS

This case is one of several pending actions arising from the use of allegedly defective copper pipe in new homes in Ladera Ranch. According to the complaint, which was filed on February 7, 2014, Brasch purchased a home constructed by Hovnanian in Ladera Ranch. He alleged Hovnanian used copper pipes that were defective, based on local water conditions, in the new homes. They also alleged Hovnanian and their contractors knew about the defective copper pipe prior to incorporating it into the homes.

With respect to the putative class, the complaint defined the class as "All homeowners in the Class Area whose residences were constructed by K. Hovnanian, and which contain copper pipe." The class area was defined as homes in the 92694 zip code that contained copper pipe. Common questions of law and facts alleged included, among others: whether the copper pipe was defective for the water conditions in the area; whether defendants had notice, and to what degree, of those conditions; whether Civil Code section 896, subdivision (a)(15) was violated by using the pipe; whether defendants

[1] There were originally other named plaintiffs, but those individuals later dismissed their claims.

violated any of the three prongs of the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.) (UCL); whether defendants breached any warranties or acted negligently; whether the Hovnanian entities are alter egos or otherwise jointly liable; whether any defenses raised are meritorious; whether the copper pipe has corroded, or needs to be removed or replaced.

The complaint stated causes of action for violation of residential construction standards (Civ. Code, § 895 et seq.), violation of the UCL, breach of implied warranties, breach of express warranties, negligence, and strict products liability. Plaintiff sought monetary, equitable, and declaratory relief on behalf of the class.

On March 10, 2014, Hovnanian filed a motion to strike the class allegations, arguing "construction defect actions are not suited for class actions," and the complaint failed to allege facts sufficient to meet the criteria for a class action. Defendants asserted "differences in home sizes, floor plans, ages, and homeowner modifications, differences in the piping installation, different prior repairs, and importantly, different types of damages, each member of the class would be required to litigate numerous and substantial questions affecting his or her individual rights to recovery, including, but not limited to, the existence of and extent of the alleged defect, the existence of damages, the manner or cause of the damages, and the type and amount of damages."

On the same date, defendants filed a demurrer to the complaint, which also sought dismissal of the class allegations, along with the breach of warranty claims. It did not address the remaining claims. The demurrer offered arguments similar to the motion to strike with respect to the class allegations. Plaintiff opposed, arguing the class was adequately pleaded and that California disfavored determining class treatment at the pleading stage. Defendants filed reply briefs.

In April 2014, the court posted an Internet tentative on both the demurrer and motion to strike favoring defendants. After oral argument, the court granted both

motions. On April 15, signed an order granting the motion to strike prepared by defendants. Plaintiff appealed the motion to strike on May 13.

The court did not sign the order sustaining the demurrer until June 3, 2014. It granted the demurrer to the two breach of warranty causes of action and the class action allegations. The case was not dismissed, presumably because plaintiff, as an individual, still had other causes of action remaining.

II

DISCUSSION

*Request for Judicial Notice*

Defendants request we take judicial notice of an Orange County ordinance and a California building standards bulletin. Although these documents are only of marginal relevance, plaintiff does not oppose the request, which is hereby granted. (Evid. Code, §§ 452, 459.)

*Mootness and Motion for Sanctions*

Defendants, as we indicated above, argue this appeal is moot because plaintiff did not appeal both from the demurrer and motion to strike. The notice of appeal, which we must construe broadly, states that plaintiff appeals from the "order striking class allegations with prejudice." This language, although imprecise, is broad enough to address the court's duplicative rulings on both the demurrer and motion to strike, as both rulings have the identical impact of "striking class allegations with prejudice." Accordingly, we deem the notice of appeal sufficient to address both orders and grant us jurisdiction.[2] While the demurrer was not specifically addressed in

[2] No order is attached to the notice of appeal. In any event, at the time plaintiff filed the notice of appeal and case information statement, the final order on the demurrer had not been filed yet.

plaintiff's briefing, this is unnecessary, given the language in the written orders striking the class language and sustaining the demurrer on the class issues was literally identical.

Accordingly defendants' motion for sanctions is denied.

*Standard of Review*

If this was an appeal from a motion denying class certification, we would be reviewing for an abuse of discretion. (*Osborne v. Subaru of America, Inc.* (1988) 198 Cal.App.3d 646, 654.) But it is not. Defendants attempt to quash the class action allegations at the pleading stage, and our standard of review is therefore de novo under the well-settled rules governing appellate review of pleadings. (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53.) "A motion to strike, like a demurrer, challenges the legal sufficiency of the complaint's allegations, which are assumed to be true. [Citation.]" (*Id.* at p. 53.) Our review is de novo. (*Ibid.*; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

*Sufficiency of the Class Action Allegations*

Class actions are permitted "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." (Code of Civ. Proc., § 382.)

"Drawing on the language of Code of Civil Procedure section 382 and federal precedent, we have articulated clear requirements for the certification of a class. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) "'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or

defenses typical of the class; and (3) class representatives who can adequately represent the class.'" [Citations.]" (*Ibid.*) Courts may also consider whether the class action procedure is "superior" to litigating claims individually. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 332.)

Both parties spend significant time and energy discussing the propriety of addressing class issues at the pleading stage. There are cases supporting both arguments. (*Prince v. CLS Transportation, Inc.* (2004) 118 Cal.App.4th 1320, 1328; *Silva v. Block* (1996) 49 Cal.App.4th 345, 349-352.) But we keep in mind that while there are cases where the complaint manifestly fails to adequately plead the existence of a valid class, in general, policy favors that plaintiffs have the chance to conduct discovery and present an evidentiary motion supporting their class claims. (See *In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298, 1301.) To prevail at the pleading stage, the inadequacy of the class action allegations must appear on the face of the complaint.

Defendants do not contest the ascertainability question at this juncture. We therefore move on to the community of interest factors.

The first issue is predominance of common questions. "The 'ultimate question' the element of predominance presents is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] A court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if

the members must individually prove their damages.' [Citations.]" (*Brinker*, *supra*, 53 Cal.4th at pp. 1021-1022, fn. omitted.)

If defendants are to be believed, there is simply nothing more complex in the world than allegedly defective copper pipes. "Each home is unique and so too are the pipes that supply water to them. Depending on the home, pipes run through the walls, in the ceilings, and/or under floorboards; the pipes travel in a straight line, turn corners, brand in two directions, reduce or enlarge in size; and the pipes connect to fixtures and appliances such as sinks, toilets, showers, dishwashers, water heaters, laundry machines, and garden spigots."

Good heavens. It would almost seem that the issue of whether these pipes, with all their changes of directions and different uses and whatnot, had nothing whatsoever in common. But according to the complaint — which we must accept as true — they do have things in common. They are all defective for the water conditions in Ladera Ranch, and they leak. When all the nonsense and bluster is set aside, that is truly what is at issue here. Despite defendants' conclusory assertions to the contrary, there is nothing here *based on the allegations of the complaint* that suggests that each house is so unique that common facts, such as liability and defenses, cannot be considered as a class.

Defendants focus significantly on the differing "alleged harm," to the putative class members, apparently trying mightily to avoid the word "damages." Because as defendants are undoubtedly aware, differences in damages between members of a putative class alone are not enough to defeat class certification. (*Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th 319, 332.) It also does not appear, from the face of the complaint, that the issues involving damages are so complex as to preclude eventual certification. (*Brown v. Regents of University of California* (1984) 151 Cal.App.3d 982, 990-991.)[3]

[3] This was also a personal injury case, where individualized damage issues may render the action particularly unsuitable for class determination.

While defendants assert there will be numerous individual issues regarding causation, that is not apparent from the face of the complaint. The cases defendants discuss and rely upon are cases where certification was denied after such differences had been established as an evidentiary matter, and are therefore of little value here. (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1430-1431; *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.) As presented by the complaint, the fundamental question this case poses is whether the pipes are defective. This is the common issue which predominates above all others and is amenable to class treatment. We therefore conclude the trial court erred when it found the complaint, on its face, did not adequately allege the predominance of common questions.

We then move on to the issues of typicality and adequacy of representation. The plaintiff's claims must be typical of the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.) The class representative must be able to adequately represent the class. (*Brinker, supra,* 53 Cal.4th at p. 1021.) This prong also includes the issue of whether the plaintiff's attorney is qualified to conduct the proposed litigation. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.)

Defendants, once again, argue that living in the class area in a home with allegedly defective pipe is not enough to make plaintiff's claims typical, because each home has its "own unique characteristics and contain[s] significant variability in both the existence, severity and the amount of damages." Defendants are once again missing the forest for the trees. The essential question in this case, as we discussed earlier, is whether the pipes leak, and what defendants knew about the pipes leaking, the water conditions, and when they knew it. Despite their attempts to make this case into the most complex litigation in the world, it simply is not that complicated. Plaintiff has adequately pleaded that his claims are typical.

With respect to adequacy, defendants attempt to attack plaintiff's attorneys with matters outside the complaint. The complaint alleges the attorneys have "the

experience, knowledge, and resources to adequately and properly represent the interests of the proposed class." Factual issues may be addressed during the class certification motion.

Defendants also claim plaintiff never addressed the issue of whether class action treatment would be superior to individual lawsuits. Plaintiff pleads this in his complaint, using the specifics about the common claims to bolster his statement. Defendants' arguments about the other original class plaintiffs who dropped out for various reasons proves less than nothing. This element is adequately pleaded. As a whole, given the liberal standards for adequacy of pleading, the complaint sufficiently alleges a class action.

## III

## DISPOSITION

The court's order granting the motion to strike and sustaining the demurrer are reversed as to the class allegations. The class allegations are ordered restored to the complaint. Plaintiff is entitled to his costs on appeal.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.